FEDERAL MEDIATION AND CONCILIATION SERVICE

ARBITRATION AWARD

IN THE MATTER OF ARBITRATION	)	
	)	
Between	)	
	)	**File# 04-56548**
	)	
NATIONAL TREASURY EMPLOYEES UNION, Chapter 274	)	
	)	
and	)	
	)	**John Remington, Arbitrator**
FEDERAL DEPOSIT INSURANCE CORPORATION	)	
	)	
	)	

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a dispute over the Employer's alleged violation of a Memorandum of Understanding concerning the non-selection of employee Scott Duffney for a Corporate Success Award (CSA), selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and through the rules and procedures of the Federal Mediation and Conciliation Service, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on February 16, 2005 in New Hope, Minnesota at which time the parties were represented and were fully heard. Oral testimony and documentary evidence were presented by the parties; no stenographic transcription of the proceedings

was taken; and the parties waived oral closing arguments and instead agreed to file post hearing briefs that were subsequently received by the Arbitrator on August 8, 2005.

The following appearances were entered:

For the Employer:

David M. Swiss	Counsel, Corporate Affairs Section Kansas City, MO

For the Union:

Dianna L. Anderson	Assistant Counsel Denver, CO

THE ISSUE

DID THE EMPLOYER VIOLATE THE PARTIES' MEMORANDUM OF UNDERSTANDING DATED 3/13/03, AND/OR ABUSE ITS DISCRETION WHEN IT DECLINED TO GRANT GRIEVANT SCOTT DUFFNEY A CORPORATE SUCCESS AWARD (CSA) IN 2004 AND, IF SO, WHAT SHALL THE REMEY BE?

PERTINENT CONTRACT PROVISIONS

MEMORANDUM OF UNDERSTANDING BETWEEN FDIC & NTEU (DATED 3/13/03)

1. CSA's will be distributed to employees in a fair and equitable manner, and in accordance with the terms of this MOU and FDIC Circular 2420.1.

2. The Employer agrees to provide data to NTEU in an electronic spreadsheet on bargaining unit Corporate Success Award (CSA) recipients in 2004 and 2005 (based on contributions made in 2003 and 2004, respectively) that will include the following fields: division/office, position title, pay plan, job series, grade, region, duty station, gender, race/national origin and age (date of birth).

3. If the data for one or more groups included in the fields identified in #2, above, indicates a rate of distribution that is less than 80% of the distribution rate for the group with the highest rate in that field, the FDIC and the NTEU will conduct a joint review of the approved awards to determine if these results can be justified by a legitimate business reason or explained by the size(s) of the group(s) being compared. However, this joint review process does not waive the right of the Union or any employee to seek remedial relief in any appropriate legal forum.

4. Any grievances filed over the failure to receive a CSA will be filed under an expedited grievance procedure, under which the parties agree to waive Step One of the negotiated grievance procedure.

5. ……

6. ……

7. ……

CHAPTER 11
CORPORATE SUCCESS AWARDS

11.1 . Definition
The Corporate Success Award is an annual award that provides for a 3.0 percent increase in basic pay (in addition to the annual Pay Adjustments) for those employees who are recognized as the top contributors within the Corporation. The purpose of this award is to recognize an employee's individual initiative, exceptional effort and/or achievements that reflect important contributions to the Corporation and/or its organizational components. An employee recognized with this award will have made important contributions that are within or outside of the scope of his/her job; however, when within the scope of the employee's job, such contributions must reflect initiative, effort or achievement beyond that normally expected from an employee in that position and grade.

This award is effective for 2004 and 2005 and will be implemented during the first full pay period of each year, respectively. These awards will be issued on an annual

basis to acknowledge contributions made during the year. Corporate Success Awards will be distributed to employees in a fair and equitable manner.

11-2. Eligibility

All non-executive employees who have current ratings of record from the FDIC of "Meets Expectations" are eligible. …… Individuals, not teams, are eligible for the Corporate Success Award.

11-3. Relationship to Other Awards

Corporate Success Awards are not intended to replace existing incentive awards. However, the receipt of another type of award during the preceding year does not necessarily mean the employee will be nominated to receive a CSA. ……

11-4. Criteria

A. **Business Results:** Consistently displays a high level of initiative, creativity, and innovation to produce results that reflect important contributions to the Corporation and/or it organizational components.

B. **Competency:** Demonstrates an exceptional degree of competency within his/her position, and is frequently relied upon by others for advice, assistance, and/or judgment that reflect important contributions to the Corporation and/or its organizational components.

C. **Working Relationships:** Builds extremely productive working relationships with co-workers, other Divisions/Offices, or other public or private sector agencies based on mutual respect that reflect important contributions to the Corporation and/or its organizational components.

D. **Learning and Development:** Takes an active part in developing personal skills and competencies and applies newly acquired skills and competencies that reflect important contributions to the Corporation and/or its organizational components.

11. 5 Procedures

A. Supervisors shall conduct a group meeting with employees at least annually, to explain the Corporate Success Award criteria and to discuss how the criteria apply to the work of their organization and unit.

B. Supervisors shall nominate their top contributors by preparing form FDIC 2420/21. Corporate Success Award Nomination Form.

C. Reviewing Officials, as designated in the Division/ Office delegations of authority, will ensure the consistent application of Corporate Success Award criteria and the fair and equitable treatment of employees.

……

F. The Chairman has sole discretion to set the percentage of bargaining unit and non-bargaining employees who will be recognized as top contributors under the Corporate Success Award program no later than 30 days prior to the end of the consideration cycle. However, the percentage of bargaining unit employees to receive the Corporate Success Award will be no less than 33 1/3 percent.

BACKGROUND

The Federal Deposit Insurance Corporation (FDIC), hereinafter referred to as the "AGENCY" or "EMPLOYER," is an Agency of the United States Government and a federal employer within the meaning of Section 7103, Title 5 of the U.S. Code. (Bank) Examiners employed within the Agency's Division of Supervision and Consumer Protection Field Offices are represented by the National Treasury Employees Union (NTEU) and its Local 274, hereinafter referred to as the "UNION." Although Grievant had retired from the Agency at the time of the arbitration hearing, he was at all times

relevant to the origin of this dispute, including the filing of the instant grievance, working within the bargaining unit.

Scott Duffney, the Grievant in this matter, was employed by the Agency for approximately twenty-eight (28) years. Grievant retired in December of 2004 from his position in the FDIC Minneapolis Field Office as a Senior Bank Examiner, Grade 13, a grade which he had held since 1986. From 1999 until his retirement Grievant also served as Executive Vice President of Local #274. Grievant received a "Meets Expectations" performance rating for 2003 and applied to be considered for a CSA based on his 2003 contributions to the Agency. Grievant did not receive a CSA in 2004. The CSA nomination process was deemed confidential and Grievant first learned at the arbitration hearing that his immediate Supervisor, Chris Drown, did not nominate him for the award. Drown did not testify at the hearing. The record reveals that, despite applying for a CSA, Grievant opposed the CSA program in concept and referenced this opposition in his CSA application.

When Grievant learned that he had not been selected for a CSA based on his 2003 performance, he filed a "Grievance" on March 24, 2004 alleging that "despite Grievant's major impacts to the productivity and organizational results of the FDIC" and the belief that his contributions during 2003 "warranted his receipt of a CSA", he had been denied such an award in "breach of Circular 2420.1, Article 18 of the Nationwide Agreement between the Union and the FDIC" and in violation of Article II Part C of the 2003-05 Compensation Agreement between the FDIC and the Union. In remedy, the grievance requests:

1. That he be awarded a CSA for 2004 for his work in 2003 and that such award, with interest, be retroactive to January 1, 2004

2. For such other relief as is proper under the circumstances.

3. A step Two Hearing with oral presentation should be set for this case within 10 working days from the date the FDIC provides undersigned steward with responses to the Information Request that is being filed in connection with this Grievance.

4. All attorneys' fees.

5. All other remedies allowed by law.

The grievance was denied by the Agency at each step of the negotiated grievance procedure. These denials simply indicated that Grievant had not demonstrated how his contributions were comparable or superior to an employee who ultimately received the award.

Prior to the arbitration hearing the Union requested the Arbitrator to compel the production of certain documents relating to the nomination and ranking of those individuals considered for CSA awards in 2003. Although the Arbitrator ordered that this documentation be provided, the Agency respectfully declined to do so. The grievance was timely appealed to arbitration and there is no question of substantive arbitrability. The matter is therefore properly before the Arbitrator for final and binding determination.

CONTENTIONS OF THE PARTIES

The Union takes the position that the CSA criteria were not fairly and equitably applied to Grievant's 2003 contributions to the Agency resulting in Grievant not being

granted, or even nominated for, a CSA award in 2004. Indeed, it argues that Grievant's contributions were comparable or superior to at least one of the ultimate award recipients. The Union's argument in this regard is related to its contention that the Agency's refusal to provide certain requested documentation prevented Grievant from effectively comparing himself with other applicants, a comparison required by the CSA process. Accordingly, the Union urges that the Arbitrator draw an adverse inference from the Agency's refusal to provide the requested information. Specifically, the Union argues that the withheld information used by Grievant's supervisor to determine nominations would have shown that Grievant's contributions were equal or superior to those of other nominees. It therefore must be inferred, the Union contends, that if Grievant's supervisors had fairly applied the criteria, Grievant would have been nominated and accorded the same treatment as other nominees who received the award. The Union maintains that the above requested information was directly relevant to the main issue in this dispute: whether or not the Employer fairly applied the CSA criteria. In remedy, the Union takes the position that Grievant must be retroactively granted a CSA award for 2004.

The Employer takes the position that the Grievant was unable to demonstrate that, on a comparative basis, he was more deserving than any other employee who received the CSA award for 2004, and that the burden is on the employee to demonstrate a favorable comparison. In this connection it argues that FDIC Managers have broad discretion to decide who receives CSA's. Further, the Employer maintains that there is no evidence that the Employer abused its discretion in making the determination that Grievant should not receive a CSA award in 2004. The Employer also takes the position

that the "fair and equitable requirement" applies to the process used to distribute the awards in general, and not to each individual award. The Employer maintains that the Union is not entitled to an adverse inference on its claim that the Agency failed to provide sufficient documentation for Grievant to make appropriate comparisons prior to the arbitration. It argues that disclosure of certain ranking and evaluation documents could lead to the identification of individual nominees. Finally, the Employer argues that even if the Arbitrator finds in favor of the Grievant, the remedy is limited.

DISCUSSION, OPINION AND AWARD

The Corporate Success Award program negotiated by the Employer and the Union is undoubtedly a mechanism intended to allow the Employer discretion in granting supplemental increases to pay based on the merits of an individual employee's contributions to the mission of the Agency. These pay awards are to be made to the most meritorious ("top contributors") employees. In order for any merit pay plan to be effective and ultimately successful it must be based on clear, empirical standards with rewards linked to these standards. Further, the plan must be administered in a manner that is perceived by all participants to be equitable and fair. To do so the parties have created specific merit "Criteria" and "Procedures" to ensure consistent application of these criteria in the evaluation, nomination, and selection of employees. The Union's position in this dispute is that because the Employer has refused to provide comparative information concerning the nomination and selection process, Grievant has been prevented from effectively comparing himself with those that were nominated and the Union has been unable to determine if the process was equitably and fairly administered.

There can be little doubt that the refusal of the Agency to provide the requested data on the respective contributions of CSA nominees and recipients, specifically the manner in which the stated criteria were applied in the evaluation and nomination process, frustrated the Grievant's attempt to compare himself, as demanded by the Agency in its grievance response, with those that were nominated. Indeed, the absence from the record of testimony or documentation from Drown prevents the Arbitrator from reaching a clear determination concerning the fairness or equity of the process. As the Grievant and Union have consistently argued from the inception of this grievance, if the process is comparative as the Agency maintains, then Grievant must be provided with relevant factual information regarding other comparable employees to determine whether or not his contributions are equal or superior to those of successful applicants. This is so even though Grievant was not nominated for the award since in order to demonstrate that he favorably compared with those who were awarded he must be able to determine on what basis certain people were nominated or rejected for nomination.

It is readily apparent that the refusal of the Agency to provide comparative information both prevented an independent review of Grievant's contributions and frustrated the grievance procedure. At the very least a Grievant must have access to the same information as did those who made the nominations. Simply asserting that a particular Grievant failed to prove that his contributions were not as significant as those of an award recipient is not a responsive answer to a grievance when it is the Employer that is in sole possession of the relevant information required to reach such a conclusion. This is not to suggest that the Agency has limited discretion in evaluating the relative contributions of its employees. On the contrary, the Agency clearly has broad discretion

to decide which employees will receive CSA's. However, it must be prepared to defend the exercise of this discretion in the grievance procedure, and ultimately in arbitration, when legitimate grievances are raised challenging whether or not the Agency has distributed CSA's in a fair and equitable manner as it agreed with the Union to do. The Employer has the discretion to make judgments but it must be prepared to explain and defend those judgments. Here the Arbitrator is compelled to find that the Agency failed to do so both during the grievance procedure and at the arbitration hearing.

As this Arbitrator has held in a similar matter, since Grievant was not nominated, he was essentially denied access to the CSA procedure which may, or may not, have resulted in his being selected for an award. While it is true that the fact that Grievant was eligible for a CSA does not automatically entitle him to receive one, it would clearly be an abuse of discretion to exclude him from consideration for non-meritorious or arbitrary reasons. Accordingly, it is this decision concerning nomination to which the fair and equitable standard must be applied.[1] Unfortunately, there is nothing within the record to support the Agency's claim that this decision was simply the proper exercise of its broad discretion rather than arbitrary or capricious behavior. No documentation regarding the nomination process was provided, either during the grievance process or at the arbitration hearing, despite the fact that the Union timely requested this information and the Arbitrator subsequently ordered the Agency to produce it. This documentation includes copies of any documents prepared, read, or considered by Drown to support the preliminary nominations; copies of the nomination forms for all risk management bargaining unit employees in the Kansas City Region; and copies of any documents

[1] NTEU and FDIC, FMCS 04-56554 (Tommins), September 7, 2005.

prepared in ranking nominations by the nominees supervisor or the Field Office supervisors.

It would appear, based on the record of the hearing, that Grievant made significant contributions to the mission of the Agency during 2003. Grievant testified that he assumed three assignments in the Mankato Field Office and volunteered to be Examiner in Charge of a "troubled (three-rated) bank" examination when the previously assigned Examiner in Charge was prevented from serving by a family emergency. Further, he also volunteered for a six-month compliance detail when the region needed compliance assistance. His testimony in this regard was supported by his performance evaluation in which Drown noted that he had volunteered to assist in meeting field office and regional needs. Further, Grievant also volunteered, on short notice, to be the Examiner in Charge on a "five-rated" bank where he assisted the primary regulator, the Office of Comptroller of Currency, in the examination and subsequent liquidation of the bank.[2] Five rated banks are typically assigned to Grade 14 examiners rather than to Grade 13s. Indeed, much of Grievant's work during 2003 was outside the normal scope of a Grade 13 examiner's duties. Grievant also received a "STAR" award for this work on the only five-rated bank in the Minneapolis territory in 2003. Grievant's testimony concerning his 2003 contributions was generally corroborated by the credible testimony of Barbara Falstad, a Grade 15 Examiner and former supervisor. Falstad also testified that Grievant's contributions were comparable to those of at least two 2003 CAS recipients. Falstad was nominated for, and received, a CSA for her 2003 contributions. In rebuttal, the Agency offered only the testimony of Steve Flaten, Field Supervisor for the Minneapolis territory. Flaten testified that he discussed the accomplishments of each

[2] Five rated banks are deemed probable failures and pose a significant risk to the deposit insurance fund.

individual employee with Drown and specifically recalled discussing Grievant's above three and five-rated bank examinations along with Grievant's CSA submission listing his accomplishments. However, Flaten had only a vague recollection of the CSA nominations, was unable to provide meaningful insight into how the nominees were ranked, and gave no indication as to how Grievant compared with the nominees or any specific reason why Grievant was not nominated. In fairness to Flaten, it must be noted that his discussions with Drown about Grievant's contributions occurred over two years ago, that he was not responsible for nominating Grievant for a CSA, and that he had little direct contact with Grievant in 2003. However, based on the evidence presented, the Arbitrator can only infer that the withheld documentation and/or the testimony of Drown would not have supported the position taken by the Agency.

The Arbitrator has fully considered the Employer's objections to providing the documentation requested by the Union. However, he is constrained by the requirements of the parties' collective agreement at Article 48 that provides:

> The arbitrator shall have the obligation of assuring that all necessary facts and considerations are brought before him or her by the representatives of the parties.

To ignore this contractual requirement would constitute an abdication of his arbitral authority. Here the documentation relied upon by the Employer in nominating possible CSA recipients is relevant, indeed crucial, to a determination of whether or not the Agency abused its discretion in the nomination process. This is particularly true in the absence of testimony from Drown. The Arbitrator here notes that the failure of the immediate supervisor to testify clearly distinguishes this dispute from that decided by Arbitrator Feigenbaum in FMCS 04-50030.

Neither, as the Agency argued, does the above referenced documentation appear to be exempt from disclosure because it somehow relates to the deliberative process since Agency policy is not in question here. Further, as noted elsewhere, the Arbitrator must reject the Employer's claim that the information requested by the Union implicates the privacy interests of supervisors or is prohibited by the provisions of the Privacy Act.[3] In this connection, it is incorrect, as the Agency asserts in its brief, that the Arbitrator did not request any documents from the Agency. His order to produce those documents was compelled by the provisions of the collective agreement and was issued well in advance of the hearing and discussed at the commencement of the hearing. It was reiterated at the close of the hearing when he requested of the Employer and the Union if they had further proofs or evidence to offer. The Agency indicated that they had none. Given the requirements of the collective agreement it is simply disingenuous for the Agency to refuse to provide documentary evidence or testimony solely within its control and then object to the Arbitrator drawing an adverse inference from this refusal.

The Arbitrator has conducted a thorough review and analysis of the entire record in this matter including a careful reading of the post hearing briefs submitted by the respective parties. Further, he is persuaded that the crucial issues raised at the hearing and in the briefs have been addressed above, and that certain other matters that arose in these proceedings must be deemed irrelevant, immaterial or side issues at the very most, and therefore have not been afforded any significant treatment, if at all, for example: whether or not Grievant was a subject matter expert in 2003; whether or not Grievant opposed the CSA program in his role as a Union representative; whether or not Grievant was able to compare himself with any specific bargaining unit employee in the Kansas

[3] NTEU and FDIC, FMCS 04-56554 (Tommins).

City Region; whether or not Flaten told Grievant that the award process was flawed; the awards of Arbitrators Vaughn (Grievant was nominated for a CSA), Goodstein, Talarico, Hooper, Gootnick, Helburn, Kaplan, Strongin, Ross, Lumbley, or Lang; and so forth.

Having considered the above review and analysis together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes that with the specific facts of the subject grievance, and within the meaning of the parties' collective agreement the Union has established by a preponderance of the evidence that the Employer violated the Memorandum of Understanding of 3/13/03 and abused its discretion when it declined to nominate Grievant Scott Duffney for a Corporate success award. Accordingly, an award will issue, as follows:

AWARD

THE AGENCY VIOLATED THE MEMORANDUM OF UNDERSTANDING AND ABUSED ITS DISCRETION WHEN IT DECLINED TO NOMINATE SCOTT DUFFNEY FOR A CORPORATE SUCCESS AWARD FOR 2003. THE GRIEVANCE MUST BE, AND IS HEREBY, SUSTAINED.

REMEDY

GRIEVANT SHALL BE AWARDED AN AMOUNT EQUAL TO 3% OF HIS 2004 BASE PAY AS SET FORTH IN II.C. OF THE PARTIES' 2003-05 COMPENSATION AGREEMENT.

As he found in the Timmons case noted above, the Arbitrator specifically rejects the Employer's contention that if the grievance is granted the Arbitrator must then select an employee who should not have received a CSA. The Arbitrator has no authority to substitute his judgment for that of the Agency by either determining that an employee

should receive a CSA or that an employee should not receive this award. The above remedy should therefore not be interpreted as a CSA award to Grievant. Rather, it is a make whole remedy for the Agency's violation of the agreement and abuse of discretion in not nominating him for this award. Further, it is the Agency that has the discretion to determine what percentage of the bargaining unit will receive an award. While the Union agreed that the award would be limited to some percentage of the unit, the 33 1/3% figure was not negotiated but rather imposed by the Agency.

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John Remington, Arbitrator

October 14, 2005

St. Paul, MN